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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF OREGON

12 LISA MACY,

Civil No. 08-655-AA
OPINION AND ORDER

13 Plaintiff,

14 vs.

15 MICHAEL J. ASTRUE,
Commissioner of Social Security,

16 Defendant.

17 _____
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28

1 AIKEN, Judge:

2 Plaintiff, Lisa Macy, brings this action pursuant to the
3 Social Security Act ("Act"), 42 U.S.C. §§ 405(g) and
4 1383(c)(3), requesting judicial review of a final decision of
5 the Commissioner denying her application for disability
6 insurance benefits ("DIB") under Title II of the Act. For the
7 reasons set forth below, the Commissioner's decision is
8 affirmed and this case is dismissed.

9 PROCEDURAL BACKGROUND

10 On July 8, 2003, plaintiff filed an application for DIB.
11 Tr. 12, 49. The claim was denied initially (tr. 42), and on
12 reconsideration (tr. 37). Plaintiff appealed the decision and
13 on September 14, 2005, an Administrative Law Judge ("ALJ 1")
14 conducted a hearing at which time he heard testimony from two
15 witnesses: plaintiff, who was represented by an attorney; and
16 Eileen Lincicome, a vocational expert ("VE"). Tr. 245-273. On
17 December 14, 2005, ALJ 1 found plaintiff not disabled within the
18 meaning of the Act. Tr. 9-21. On April 5, 2006, the Appeals
19 Council denied plaintiff's request for review (tr. 4-6), making
20 ALJ 1's decision the final agency decision. See 20 C.F.R. §§
21 404.981, 416.1481. Plaintiff appealed the agency decision to
22 district court. On December 16, 2006, the court reversed and
23 remanded the case to the Administrative Agency based on
24 stipulation of the parties. Tr. 295-96.

25 On September 18, 2007, a second Administrative Law Judge
26 ("ALJ 2") conducted a hearing at which time she heard testimony
27 from two witnesses: plaintiff, who was again represented by an
28 attorney; and VE Susan Burkett ("VE 2"). Tr. 368-407. On

1 November 6, 2007, ALJ 2 found plaintiff not disabled within the
2 meaning of the Act. Tr. 281-91. On March 28, 2008, the Appeals
3 Council denied plaintiff's request for review (tr. 277-80),
4 making ALJ 2's decision the final agency decision. See 20
5 C.F.R. §§ 404.981, 416.1481. On May 30, 2008, plaintiff
6 appealed the final agency decision to this court.

7 STATEMENT OF FACTS

8 At the time of the September 18, 2007 hearing, plaintiff
9 was 45 years old and had a high school education. Tr. 49, 68.
10 Plaintiff's past relevant work experience includes working as a
11 cleaner/housekeeper and a small products assembler. Tr. 79-80.

12 Plaintiff alleges disability based on a combination of
13 impairments including: pain and swelling of the lower back;
14 inability to perform household chores; inability to sit or stand
15 for extended periods; need to lay down several times each day;
16 frequent falling (due to back pain and/or weakness or numbness
17 in legs); daily crying spells; depression; obesity; and side
18 effects from medicine (including drowsiness, fatigue,
19 irritability, and diminished concentration, focus and
20 attention). Doc 10, pp. 2-3. Plaintiff alleges an onset date
21 of February 26, 2003. Tr. 49.

22 STANDARD OF REVIEW

23 This court must affirm the Secretary's decision if it is
24 based on proper legal standards and the findings are supported
25 by substantial evidence in the record. Hammock v. Bowen, 879
26 F.2d 498, 501 (9th Cir. 1989). Substantial evidence is "more
27 than a mere scintilla. It means such relevant evidence as a
28 reasonable mind might accept as adequate to support a

1 conclusion." Richardson v. Perales, 402 U.S. 389, 401
2 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S.
3 197, 229 (1938)). The court must weigh "both the evidence that
4 supports and detracts from the Secretary's conclusions."
5 Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

6 The initial burden of proof rests upon the claimant to
7 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
8 (9th Cir. 1986). To meet this burden, plaintiff must
9 demonstrate an "inability to engage in any substantial gainful
10 activity by reason of any medically determinable physical or
11 mental impairment which can be expected . . . to last for a
12 continuous period of not less than 12 months. . . ." 42 U.S.C.
13 § 423(d) (1) (A).

14 The Secretary has established a five-step sequential
15 process for determining whether a person is disabled. Bowen v.
16 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
17 416.920. First the Secretary determines whether a claimant is
18 engaged in "substantial gainful activity." If so, the claimant
19 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
20 §§ 404.1520(b), 416.920(b).

21 In step two the Secretary determines whether the claimant
22 has a "medically severe impairment or combination of
23 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R. §§
24 404.1520(c), 416.920(c). If not, the claimant is not disabled.

25 In step three the Secretary determines whether the
26 impairment meets or equals "one of a number of listed
27 impairments that the Secretary acknowledges are so severe as to
28 preclude substantial gainful activity." Id.; see 20 C.F.R.

1 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
2 presumed disabled; if not, the Secretary proceeds to step four.
3 Yuckert, 482 U.S. at 141.

4 In step four the Secretary determines whether the claimant
5 can still perform "past relevant work." 20 C.F.R.

6 §§ 404.1520(e), 416.920(e). If the claimant can work, she is
7 not disabled. If she cannot perform past relevant work, the
8 burden shifts to the Secretary. In step five, the Secretary
9 must establish that the claimant can perform other work.

10 Yuckert, 482 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f),
11 416.920(e) & (f). If the Secretary meets this burden and proves
12 that the claimant is able to perform other work which exists in
13 the national economy, she is not disabled. 20 C.F.R. §§
14 404.1566, 416.966.

15 DISCUSSION

16 1. The ALJ's Findings

17 At step one, ALJ 2 found plaintiff had not engaged in
18 substantial gainful activity during the relevant time period.
19 Tr. 286, Finding 2.

20 At step two, ALJ 2 found plaintiff had degenerative disc
21 disease in her lumbar spine, a severe impairment. Tr. 286,
22 Finding 3.

23 At step three, ALJ 2 found plaintiff "does not have an
24 impairment or combination of impairments that meets or medically
25 equals the criteria of any of the listed impairments in 20 CFR
26 Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525
27 and 404.1526)." Tr. 287. ALJ 2 then determined plaintiff's
28

1 residual functional capacity ("RFC")¹:

2 After careful consideration of the entire record, the
 3 undersigned finds the claimant's residual functional
 4 capacity allows her to perform a limited range of light
 5 work. She is able to sit 3 to 6 hours for 15 minutes at
 6 a time during a fulltime 8-hour workday. She is able to
 7 stand 3 to 6 hours for 10 minutes at a time during a
 8 fulltime 8-hour workday. She is able to walk 3 to 6
 9 hours for 15 minutes at a time during a fulltime 8-hour
 10 workday. She is able to lift 10 pounds occasionally
 11 (i.e. up to one-third of the workday) and less than 10
 12 pounds frequently (i.e. up to two-thirds of the
 13 workday). She is able to carry 20 pounds occasionally.
 14 She must avoid bending and twisting. She is able to
 15 occasionally engage in crouching, kneeling, crawling and
 16 climbing. She is able to push and/or pull with an
 17 initial force of 30 pounds and a sustained force of 25
 18 pounds. She should avoid hazards, unprotected heights
 19 and vibration. Her ability to reach is limited with
 20 respect to exertion. She is able to lift 10 pounds from
 21 floor to waist level and 5 pounds from floor to
 22 overhead. She is sufficiently literate to understand
 23 simple directions.

24 Tr. 287.

25 At step four, ALJ 2 found plaintiff capable of performing
 26 past relevant work as a small products assembler or housekeeper.

27 Tr. 290.

28 In the alternative, at step five, ALJ 2 found the Social
 Security Administration demonstrated plaintiff could work as a
 sporting goods assembler, an electronics worker - assembly
 semiconductor, and/or a garment sorter, each existing in
 significant numbers in the national economy. Tr. 291.

29 2. Plaintiff's Allegations of Error

30 Plaintiff alleges the following errors: ALJ 2 erred in
 31 determining plaintiff's RFC; both ALJs were biased; ALJ 2 failed

32 ' The RFC is what the claimant can do despite any particular
 33 limitations. Mayes v. Massanari, 276 F.3d 453, 460 (9th Cir.
 34 2001).

1 to consider the combined effect of plaintiff's impairments and
2 fully develop the record; ALJ 2 improperly rejected plaintiff's
3 testimony; ALJ 2 erred in finding plaintiff could perform past
4 relevant work; and ALJ 2 erred in finding plaintiff could
5 perform the job of garment sorter.

6 A. Plaintiff's RFC

7 Plaintiff alleges ALJ 2 erred in determining plaintiff's
8 RFC. ALJ 2 found plaintiff was able to lift 10 pounds
9 occasionally and less than 10 pounds frequently. Tr. 287,
10 Finding 5. Plaintiff argues ALJ 2 erroneously altered the
11 findings of the Physical Capacities Exam ("PCE") in finding
12 plaintiff could lift less than 10 pounds frequently. In support
13 of this argument, plaintiff points to the results of the
14 November 18, 2002 PCE. Tr. 226-41. In that PCE, physical
15 therapist Karen Pagen ("Pagen") opined plaintiff could lift 1-10
16 pounds on an occasional basis and carry 11-20 pounds on an
17 occasional basis. Tr. 226. Pagen did not list any weight
18 plaintiff could lift on a frequent basis. Id. ALJ 2 gave
19 "significant weight" to Pagen's opinion evidence. Tr. 289.
20 Thus, plaintiff argues she could not lift any weight on a
21 frequent basis. Doc 10, pg. 16.

22 However, Pagen's opinion evidence is not the only evidence
23 in the record regarding plaintiff's lifting capabilities. On
24 August 20, 2003, Douglas W. Lieuallen, M.D. examined plaintiff.
25 Tr. 192. Dr. Lieuallen opined plaintiff "probably can't lift
26 more than 10 to 15 pounds without pain." Tr. 193. Dr.
27 Lieuallen did not give his opinion of what weight plaintiff
28 could lift on a frequent or occasional basis. Tr. 192-93.

1 In addition, on September 29, 2003, nonexamining state
2 agency physician Linda Jensen, M.D. completed a Residual
3 Physical Functional Capacity Assessment ("RPFCA"). Tr. 199-204.
4 Although the RPFCA form contains an option for the doctor to
5 check a box stating claimant could lift and/or carry *less than*
6 10 pounds frequently, Dr. Jensen instead opined plaintiff could
7 lift and/or carry 10 pounds frequently and 20 pounds
8 occasionally. Tr. 200. On November 17, 2003, state agency
9 physician Martin Kahrli, M.D. affirmed Dr. Jensen's assessment
10 of plaintiff's lifting capabilities. Tr. 204.

11 "It is the ALJ's responsibility to determine credibility
12 and resolve conflicts and ambiguities in the medical and non-
13 medical evidence; when the evidence is susceptible to more than
14 one rational interpretation, and one is provided, the ALJ's
15 conclusion must be upheld." Bowser v. Commissioner of Social
16 Security, 121 Fed. Appx. 231, 243 (9th Cir. 2005). The question
17 is not whether ALJ 2 could reasonably have found plaintiff
18 unable to lift any weight on a frequent basis, but rather
19 whether ALJ 2's finding that plaintiff could lift less than 10
20 pounds frequently is supported by substantial evidence.
21 Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989).

22 ALJ 2 cited Pagen's opinion that plaintiff could carry 20
23 pounds occasionally. Tr. 290. However, ALJ 2 also gave
24 "partial weight" to Dr. Lieuallen's opinion that plaintiff could
25 lift 10 to 15 pounds. Id. ALJ 2 similarly gave "partial
26 weight" to the RPFCA opinion that plaintiff could lift and/or
27 carry 10 pounds on a frequent basis. Tr. 290, 200.

28 The ALJ is "entitle[d] to draw inferences logically

1 flowing from the evidence." Sample v. Schweiker, 694 F.2d 639,
2 642 (9th Cir. 1982). The sole inquiry is whether the record,
3 read as a whole, yields such evidence as would allow a
4 reasonable mind to accept the conclusions reached by the ALJ.
5 Id. ALJ 2 logically inferred plaintiff could frequently lift
6 less than 10 pounds, an amount in the mid-range of fairly
7 consistent opinion evidence regarding plaintiff's lifting
8 capabilities. ALJ 2's finding that plaintiff could lift less
9 than 10 pounds on a frequent basis is rational and supported by
10 substantial evidence.

11 B. ALJs' Bias

12 Plaintiff argues "[r]ather than properly evaluate all
13 evidence favorable and unfavorable to [plaintiff], the ALJ's
14 [sic] simply chose to pick the facts that supported the ultimate
15 conclusion they intended to reach..." Doc. 10, pg. 13.
16 Plaintiff points to ALJ 1's paraphrasing of Dr. Belza's November
17 4, 2002 note: "[Dr. Belza] interpreted the incidental finding as
18 an annular tear within the foramina on the left at L4-5 that
19 could be the source of the claimant's pain." Tr. 14.

20 Dr. Belza's note stated, "[t]here is an annular tear
21 within the foramina on the left at L4-5. I believe this is the
22 source of the patient's symptomatology along with the disk."
23 Tr. 145. Plaintiff argues ALJ 1 abused his discretion by
24 rewording the note. Plaintiff's argument is unconvincing.

25 First, the "symptomatology" Dr. Belza referred to on
26 November 4, 2005 was:

27 low back pain with radiation into the left lower
28 extremity in an L5 distribution. She describes pain,
numbness and tingling with low back pain of 8 to 10 on

1 a 10-pain scale... She does describe the last three
2 days of numbness and tingling in the left upper
extremity but no neck pain.

3 Tr. 144-45. ALJ 2 found plaintiff had an impairment that could
4 reasonably be expected to produce those symptoms. Tr. 288-89.
5 However, ALJ 2 did not find plaintiff's statements regarding the
6 severity of those symptoms credible. Id.

7 Second, to succeed in a bias claim, plaintiff must show
8 that "the ALJ's behavior, in the context of the whole case, was
9 so 'extreme as to display clear inability to render fair
10 judgment.'" Bayliss v. Barnhart, 427 F.3d 1211 (9th Cir. 2005).
11 A reasonable interpretation of Dr. Belza's note is that the
12 source of plaintiff's symptomology was some combination of the
13 annular tear and the disk. To then conclude that the annular
14 tear could be the source of plaintiff's pain is a reasonable
15 interpretation of the note, supported by substantial evidence in
16 the record. This court may not second guess that
17 interpretation. Bowser, 121 Fed. Appx. at 243.

18 Plaintiff argues ALJ 2 failed to properly evaluate
19 plaintiff's lower extremity problems, and erred in concluding
20 "the evidence suggests there are no neurological deficits."
21 Doc. 10, pg. 15, tr. 289. Plaintiff asserts "[t]he ALJ's
22 conclusion was remarkable in that Dr. Belza's examination,
23 testing, and plan regarding Plaintiff's documented neurological
24 deficits were unquestionably present." Doc. 10, pg. 15. In
25 reaching this conclusion, plaintiff disregards the results of
26 the electrical studies of plaintiff's lower extremities ordered
27 by Dr. Belza on April 25, 2005. Tr. 217, 220-21.

28 On February 21, 2005, Dr. Belza examined plaintiff for the

1 first time in over two years. Tr. 218. The neurological
2 examination revealed "motor strength is 5/5 in all lower
3 extremity motor groups. Sensory is grossly intact over all
4 lower extremity dermatomes..." Tr. 219. Approximately two
5 months later, Dr. Belza's April 25, 2005 note stated, "[o]n
6 examination, she has good strength in the lower extremities and
7 decreased sensation in the lateral aspect of the foot on the
8 right. She has decreased sensation in the lateral aspect of the
9 left calf. Motor strength is 2+ in the knees bilaterally,
10 absent in the ankles bilaterally." Tr. 217. The April 25, 2005
11 plan stated "MRI scan has been declined at this time and
12 therefore we will proceed with electrical studies of the lower
13 extremities. She will return to see me following that." Id.

14 The May 11, 2005 electrical findings were: "Bilateral
15 sural sensory, peroneal motor, and tibial motor NCS were normal.
16 Monopolar needle EMG of the bilateral LE's was normal. The
17 patient was very uncomfortable [sic] during testing so paraspinal
18 testing was deferred. Interpretation: Normal examination.
19 There is no electrodiagnostic evidence of a lower extremity
20 radiculopathy, plexopathy, or mononeuropathy." Tr. 220-21. ALJ
21 2 specifically cited to the electrical studies in finding "the
22 evidence suggests no neurological deficits" Tr. 289.

23 In short, plaintiff relies on three sentences contained in
24 one note out of plaintiff's voluminous medical record in
25 determining ALJ 2 was biased because "[p]laintiff's documented
26 neurological deficits were unquestionably present." Doc. 10,
27 pg. 15. However, when viewed in the record as a whole, one sees
28 the electrical studies were actually recommended due to the

1 "longstanding and progressive nature of Ms. Macy's
2 complaints..." Tr. 219. After plaintiff's insurance company
3 declined the second MRI, Dr. Belza ordered the electrical
4 studies. Tr. 217. Rather than verifying any condition, the
5 electrical findings showed no neurological deficits. Tr. 221.
6 In fact, the interpretation was "Normal examination. There is
7 no electrodiagnostic evidence of a lower extremity radiculopathy,
8 plexopathy, or mononeuropathy." Tr. 221.

9 ALJ 2's finding that the evidence suggested plaintiff
10 suffered no neurological deficits was supported by substantial
11 evidence in the record. Therefore, this court may not overrule
12 ALJ 2's finding in that respect. Hammock, 879 F.2d at 501.

13 Again, plaintiff overlooks the fact that ALJ 2 did, in
14 fact, find plaintiff had a condition that could reasonably be
15 expected to produce numbness and tingling in plaintiff's legs.
16 Tr. 288-89. However, as discussed below, ALJ 2 found
17 plaintiff's statements concerning the intensity, persistence and
18 limiting effects of the numbness not entirely credible. Tr.
19 289.

20 C. Duty to Further Develop Record

21 Plaintiff argues ALJ 2, in determining plaintiff's RFC,
22 relied on opinions formed prior to the progression of
23 plaintiff's lower extremity problems. Thus, plaintiff argues
24 ALJ 2 had a duty to further develop the record. I note that
25 plaintiff fails to cite to a specific medical record
26 demonstrating her condition had progressed to the point she is
27 unable to work. Specifically, Dr. Belza commented on
28 plaintiff's ability to work on November 4, 2002, when he found

1 plaintiff capable of light duty work. Tr. 144-45. Although
2 plaintiff makes much out of the April 25, 2005 note finding some
3 decreased sensation, Dr. Belza did not provide a new
4 categorization of plaintiff's work capacity. Further, Dr.
5 Belza's recommendation of the second MRI (which plaintiff's
6 insurance company denied) on February 21, 2005, was not in
7 response to objective medical findings of a progressive
8 condition, but in response to the "longstanding and progressive
9 nature of Ms. Macy's complaints..." Id.

10 Plaintiff also argues that additional limitations should
11 have been posed by ALJ 2 in the hypothetical given to the VE.
12 Attorney for plaintiff asked VE 2 to answer the following
13 hypothetical: "being that a person has breaks, where they need
14 to lay down, and these occur six times a day for 15-20 minutes
15 at a time, would that rule out all competitive employment?" Tr.
16 406. The VE responded "yes". Id. However, an ALJ need only
17 include limitations supported by substantial evidence in the
18 record and found by the ALJ to be credible. Bayliss v.
19 Barnhart, 427 F.3d 1211, 1217-18 (9th Cir. 2005). Plaintiff did
20 not meet her burden of proving any additional limitations based
21 on the progression of her condition were warranted.

22 "An ALJ's duty to develop the record further is triggered
23 only when there is ambiguous evidence or when the record is
24 inadequate to allow for proper evaluation of the evidence."
25 Baines v. Astrue, 2008 WL 5210666 *6 (C.D. Cal. 2008) (internal
26 citations omitted). The record here was adequate for the ALJ to
27 properly evaluate the evidence.
28

1 D. Credibility

2 Plaintiff argues ALJ 2's credibility determination was not
3 supported by substantial evidence. Doc. 10, pp 20-21. In
4 addition, plaintiff argues the ALJs misrepresented facts in
5 order to discredit plaintiff. Id. at 21.

6 The ALJ conducts a two-part test when assessing a
7 claimant's subjective testimony. Tommasetti v. Astru, 533 F.3d
8 1035, 1039 (9th Cir. 2008). First, the ALJ determines whether
9 the claimant produced objective medical evidence of an
10 underlying medical impairment that could reasonably be expected
11 to produce some degree of symptom. Id. If so, and absent any
12 evidence of malingering, the ALJ must present specific, clear
13 and convincing reasons for rejecting claimant's testimony
14 regarding the severity of the symptoms. Id. The purpose of
15 part two of the test is for the ALJ to make "a credibility
16 determination with findings sufficiently specific to permit the
17 court to conclude that the ALJ did not arbitrarily discredit
18 claimant's testimony." Id.; citing Thomas v. Barnhart, 278 F.3d
19 947, 958 (9th Cir. 2002).

20 At step one, ALJ 2 found "claimant's medically
21 determinable impairment could reasonably be expected to produce
22 the alleged symptoms[.]" Tr. 289. ALJ 2 found plaintiff
23 alleged the following symptoms: "[s]he feels pain in her back
24 and legs. She experiences numbness and tingling in her legs.
25 She has difficulties lifting and/or carrying weight, walking,
26 standing and sitting. Her mobility is limited. She is fatigued
27 and depressed." Tr. 288.

28 However, ALJ 2 found "claimant's statements concerning the

1 intensity, persistence and limiting effects of these symptoms
2 are not entirely credible." Tr. 289. ALJ 2 proceeded to
3 provide specific, clear and convincing reasons for disputing
4 plaintiff's subjective testimony:

5 The record reveals inconsistencies between the claimant's
6 subjective complaints and the results of objective testing.
7 Karen Pagen, PT, noted issues regarding the reliability and
8 accuracy of the claimant's reported pain and limitations.
9 Ms. Pagen concluded the claimant "can do more... than she
10 currently states or perceives" (Exhibit 12F/14). This
11 finding weakens the claimant's credibility.

12 The evidence in the record reflects the claimant's
13 functional limitations are not as significant and limiting
14 as has been alleged by the claimant. As discussed above,
15 her daily activities are quite involved. She is able to
16 drive an automobile, which enables her to perform grocery
17 shopping and other household errands. She is functionally
18 independent with regard to her personal hygiene and
19 financial affairs. Therefore, the claimant's daily
20 activities suggest a level of functioning greater than what
21 she has alleged in her application and testimony.

22 While the claimant asserts numerous subjective complaints,
23 the record reveals she has received only conservative and
24 routine treatment. Her treating physicians report no
25 significant abnormalities in strength or range of motion.
26 The evidence suggests no neurological deficits. (Exhibits
27 2F, 9F, and 10F/4/6). She has not been hospitalized for
28 any significant period of time. She has declined a repeat
MRI and more aggressive forms of treatment such as
additional steroid injections and surgery. Her treatment
history contains significant gaps, including very little
medical evidence from January 2003, through April 2004.
The claimant reports that she obtained Vicodin "from
friends" during this period (Exhibits 9F/6 and 10F/2).
These facts suggest the claimant's impairment does not
result in significant functional limitation, which
precludes her from engaging in basic work activity.

23 Id.

24 As stated by the Ninth Circuit, "[i]t may well be that a
25 different judge, evaluating the same evidence, would have found
26 [plaintiff's] allegations of disabling pain credible. But, as we
27 reiterate in nearly every case where we are called upon to
28 review a denial of benefits, we are not triers of fact.

1 Credibility determinations are the province of the ALJ." Fair
2 v. Bowen, 885 F.2d 597, 604 (9th Cir. 1989). When an ALJ makes
3 specific findings justifying a decision to disbelieve an
4 allegation of excess pain, and those findings are supported by
5 substantial evidence in the record, the reviewing court will not
6 second-guess the ALJ's decision. Id.

7 The Ninth Circuit does not use "a mechanical formula in
8 determining whether properly supported reasons for an adverse
9 credibility determination are 'clear and convincing.'" Schow v.
10 Astrue, 272 Fed. Appx. 647, 652 (9th Cir. 2008). Instead, the
11 reviewing court "must evaluate whether the determination is
12 supported by substantial evidence, i.e., relevant evidence that
13 a reasonable mind might accept as adequate to support a
14 conclusion." Id. (internal citation omitted). If the reasons
15 ALJ 2 gives for discounting plaintiff's testimony are supported
16 by substantial evidence in the record, this court will not
17 disturb ALJ 2's adverse credibility finding. Tommasetti, 533
18 F.3d at 1040.

19 Plaintiff argues ALJ 2 erroneously found plaintiff was
20 able to complete household chores and declined to pursue more
21 aggressive treatments (including surgery, nerve root injections,
22 and a second MRI). Id. Defendant concedes these findings were
23 in error but argues the error was harmless. Doc. 11, pg. 14.

24 ALJ 2 relied on, and cited to, a number of specific
25 instances in the record influencing her determination of
26 plaintiff's credibility. Tr. 288-89. First, ALJ 2 stated,
27 "[t]he record reveals inconsistencies between the claimant's
28 subjective complaints and the results of objective testing.

1 Karen Pagen, PT, noted issues regarding the reliability and
2 accuracy of the claimant's reported pain and limitations. Ms.
3 Pagen concluded the claimant 'can do more...than she currently
4 states or perceives' (Exhibit 12F/14). This finding weakens the
5 claimant's credibility." Id.; quoting Tr. 239. As stated
6 above, ALJ 2 gave "significant weight" to Pagen's opinion
7 evidence. Id.

8 ALJ 2 also noted plaintiff was able to drive an
9 automobile. Tr. 289. Plaintiff went grocery shopping. Id.
10 Plaintiff is functionally independent with regard to her
11 physical hygiene and financial affairs. Id. Thus, ALJ 2 found
12 plaintiff's "daily activities suggest a level of functioning
13 greater than what she has alleged in her application and
14 testimony." Id.

15 Next, ALJ 2 found the record revealed plaintiff received
16 only conservative and routine treatment. Id. Plaintiff's
17 treating physicians reported no significant abnormalities in
18 strength or range of motion. Id. As described above, the
19 evidence suggested plaintiff had no neurological defects. ALJ 2
20 noted plaintiff had not been hospitalized for a significant
21 amount of time. Id. ALJ 2 also noted that plaintiff's
22 treatment history contained significant gaps, including a period
23 of roughly 15 months during which plaintiff obtained Vicodin
24 from friends. Id.

25 ALJ 2 cited clear and convincing evidence, supported by
26 substantial evidence in the record, regarding plaintiff's
27 credibility as to the severity and limitations of her ailments.
28 ALJ 2's error in finding plaintiff was able to complete

1 household chores and declined to pursue more aggressive
2 treatment was harmless because it is clear from the record that
3 these errors are inconsequential to the ultimate nondisability
4 determination. Schow, 272 Fed. Appx. at 653. ALJ 2 properly
5 cited to specific evidence in the record to determine
6 plaintiff's credibility. I find ALJ 2 did not arbitrarily
7 discredit plaintiff's testimony.

8 Plaintiff next argues ALJ 2 erred in rejecting plaintiff's
9 testimony regarding depression. However, ALJ 2 noted
10 "claimant's treating physician reports that her depression is
11 'completely controlled' with medication." Tr. 287 (quoting tr.
12 344). "Impairments that can be controlled effectively with
13 medication are not disabling for the purpose of determining
14 eligibility for SSI benefits." Warre v. Commissioner, 439 F.3d
15 1001, 1006 (9th Cir. 2006). Thus, ALJ 2 found plaintiff's
16 depression was not a severe medically determinable impairment.
17 Tr. 287. Although ALJ 2 found plaintiff's impairment could
18 produce depression, ALJ 2 did not believe the totality of
19 plaintiff's symptoms rendered her disabled. Tr. 288-89.

20 Finally, plaintiff argues ALJ 2 erred by failing to
21 provide reasons for rejecting plaintiff's allegations of
22 suffering debilitating side effects from medicine. Doc. 10, pp.
23 22-23. Plaintiff, however, fails to point to any objective
24 evidence in the record demonstrating that the side effects of
25 plaintiff's medication interfered with her ability to work.
26 Therefore, ALJ 2 did not err in rejecting plaintiff's subjective
27 claims regarding the severity of her side effects. See
28 Osenbrock v. Apfel, 240 F.3d 1157, 1164 (9th Cir. 2001) (ALJ did

1 not err by not including side effects from medication in
2 hypothetical to VE when, although there were passing mentions of
3 the side effects in claimant's medical records, "there was no
4 evidence of side effects severe enough to interfere with
5 Osenbrock's ability to work."); Thomas v. Barnhart, 278 F.3d
6 947, 960 (9th Cir. 2002) (ALJ properly rejected claimant's
7 subjective statements of side effects caused by pain medication
8 by using ordinary techniques of credibility evaluation in
9 finding claimant not generally credible).

10 Because ALJ 2 provided specific, clear and convincing
11 reasons for finding plaintiff unreliable, and because these
12 findings were supported by substantial evidence in the record,
13 ALJ 2's finding that plaintiff was not credible is not error.

14 E. Past Relevant Work

15 Plaintiff argues ALJ 2 erred in finding plaintiff could
16 perform past relevant work as an assembler of small products or
17 a housekeeper. Doc. 10, pp 23-25. Because the VE testimony
18 contradicts information contained in the Dictionary of
19 Occupational Titles ("DOT"), and because ALJ 2 made no findings
20 to address or justify any reliance on the deviation, ALJ 2's
21 findings at step four constitute error. Johnson v. Shalala, 60
22 F.3d 1428, 1435 (9th Cir. 1995). However, an error that is
23 inconsequential to the ultimate nondisability decision is
24 harmless error. Tommasetti v. Astrue, 533 F.3d at 1042-43.
25 Consequently, a step four error is harmless when, as here, the
26 ALJ makes a valid, alternative step five finding. Id.

27 F. Job of Garment Sorter

28 Defendant concedes that the job of garment sorter requires

1 lifting up to 20 pounds on an occasional basis. Doc. 11, pg.
2 20. Because ALJ 2 did not address and resolve this deviation
3 with the RFC determination that plaintiff could lift 10 pounds
4 on an occasional basis, ALJ 2 erred in finding plaintiff could
5 perform the job of garment sorter. Johnson, 60 F.3d at 1435.
6 However, because ALJ 2 also found plaintiff could perform the
7 job of assembler - sporting goods and electronics worker -
8 assembly semiconductor, ALJ 2's finding that plaintiff could
9 perform work as a garment sorter was inconsequential to the
10 ultimate nondisability determination, and thus harmless error.
11 Tommasetti, 533 F.3d at 1042-43.

12 CONCLUSION

13 The Commissioner's decision is based on substantial
14 evidence, and is therefore, affirmed. This case is dismissed.
15 IT IS SO ORDERED.

16 Dated this 14 day of May 2009.

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19
20 /s/ Ann Aiken

21 Ann Aiken
22 United States District Judge
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